

**FILED**

**FEB 21 2006**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DUWAYNE DAVID CUNNINGHAM,

Defendant - Appellant.

No. 05-10029

D.C. No. CR-98-00190-WBS

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Eastern District of California  
William B. Shubb, Chief Judge, Presiding

Submitted February 13, 2006<sup>\*\*</sup>

Before: FERNANDEZ, RYMER, and BYBEE, Circuit Judges.

DuWayne David Cunningham appeals from the revocation of his supervised release and the 24-month sentence imposed on the revocation. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Cunningham contends that the government breached an oral plea agreement by failing to recommend that he be sentenced at the low end of the guideline range. Cunningham did not present this contention in the district court.

Claims pertaining to the breach of a plea agreement will not generally be considered for the first time on appeal. *See United States v. Flores-Payon*, 942 F.2d 556, 560 (9th Cir. 1991). Although we may make an exception to this rule where plain error has occurred, *see id.*, in this case we are unable to conclude that (1) there was actual error; (2) the error was plain; and (3) the error affected the defendant's substantial rights. *See United States v. Olano*, 507 U.S. 725, 732 (1993). We therefore affirm the sentence.

**AFFIRMED**